

Koshe (Migration) [2018] AATA 2785 (16 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Leta Gessamo KOSHE
VISA APPLICANTS:	Mrs Fayine Dalu BADASO Master Bullo Dalu BADASO Master Sami Dalu BADASO Master Fayisa Dalu BADASO
CASE NUMBER:	1618602
DIBP REFERENCE(S):	BCC2015/2254362
MEMBER:	Shane Lucas
DATE:	16 May 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the first-named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cls.309.221 and 309.223 of Schedule 2 to the Regulations. • The Tribunal also remits the application for the second-, third- and fourth-named visa applicants for consideration in accordance with the original application.

Statement made on 16 May 2018 at 4:50pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – Whether a genuine spousal relationship exists – Significant financial support provided by sponsor to applicant – Limited evidence of joint finances – Limited evidence of joint household - Evidence of joint finances and household limited by residing in separate countries – Relationship represented to others – Relationship viewed as continuous and ongoing – Decision remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2, cls 309.211, 309.221, 309.223

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 31 October 2016 to refuse to grant the first-named visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The first-named visa applicant is an Ethiopian national born on 26 October 1993. She applied for the visa on 6 August 2015 on the basis of her relationship with the sponsor ("the review applicant"). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter, the primary criteria include cls.309.211, 309.221 and 309.223. Other members of the family unit who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet the requirements of cl.309.211(2) in Schedule 2 of the Regulations, as the delegate was not satisfied that the first-named visa applicant was in a genuine and continuing spousal relationship with the review applicant. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the first-named visa applicant was the spouse of the sponsor, as defined under s.5F of the Act.
4. The review applicant seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 20 April 2018 to give evidence and present arguments. The first-named visa applicant also gave oral evidence to the Tribunal regarding the genuine and continuing nature of the relationship between the parties. At the Tribunal's request, additional documentation was also provided within fourteen days of the hearing (i.e. before 4 May 2018).
6. The review applicant was represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issues in the present case are whether the first-named visa applicant was the sponsor's spouse for the purposes of the Act at the time of application (cl.309.211); whether at the time of decision, the first-named visa applicant continues to satisfy the criterion in cl.309.211 (cl.309.221); and whether at the time of decision, the first-named visa applicant continues to be the spouse of the sponsor (cl.309.223).
9. In this matter, the Tribunal needs also to be satisfied that at the time of application, the secondary applicants satisfy cl.309.311; and at the time of decision, the secondary applicants satisfy cl.309.321.

Relevant law

10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship. The applicants provided the Tribunal with a certified copy of a Certificate of Marriage showing the marriage was made in Gode, Ethiopia on 23 January 2015. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Whether the parties are in a spouse or de facto relationship

12. Clauses 309.211 and 309.221 require that at the time the visa application was made, and at the time of this decision, the first-named visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the first-named visa applicant claims to be the spouse of the review applicant. The parties provided documentation attesting that the review applicant (born in Bishoftu, Ethiopia on 16 December 1990) became an Australian citizen on 12 February 2014. Accordingly, the review applicant satisfies the requirements of cl.309.211(2)(a).

13. Are the other requirements for a spousal relationship met?

14. The applicants provided documentation to the Tribunal that was not available to the delegate. The Tribunal also had the benefit of hearing oral evidence from the review applicant and the first-named visa applicant.

15. Financial aspects of the relationship

16. The review applicant provided documentation and gave oral evidence detailing the financial aspects of the relationship. The parties do not maintain a joint savings account, however the Tribunal was provided with documentation detailing *Dahabshiil* money transfers from the review applicant to the first-named visa applicant totalling USD 5412.39 between June 2015 and April 2017; and *WorldRemit* money transfers from the review applicant to the first-named visa applicant totalling USD 3029 between May 2017 and March 2018. In a Statutory Declaration provided to the Tribunal (dated 8 April 2018), the review applicant stated:

17. *"Since my previous statutory declaration dated 24 May 2017, I have been financially supporting my wife [the first-named visa applicant] and her three dependent brothers, all four of them being orphans since their parents were both killed in a motor vehicle accident on 12 October 2009... From the funds I send to [the first-named visa applicant], plus the salary she receives from her employment and the profits she receives from the small farm, she has been able to survive and to keep her family of three dependent brothers going until hopefully when her visa application is granted."*

18. The review applicant also gave oral evidence indicating that he has contributed financially to the upkeep of the first-named visa applicant and her dependents during his visits to Ethiopia in January-March 2015 and February-March 2017. The Tribunal also received

documentation (dated 15 May 2017) attesting that the review applicant has nominated the first-named visa applicant as sole beneficiary of his HESTA superannuation fund in the event of his death.

19. On consideration of the evidence, the Tribunal acknowledges that the parties have shared some day-to-day expenses and that the review applicant has regularly provided the first-named visa applicant with moneys to assist her and her dependents in their daily lives. However, the Tribunal found no evidence that the couple have pooled their financial resources in a meaningful way. The Tribunal found no evidence of any joint ownership of real estate or other major assets or any joint liabilities. The Tribunal also found no evidence that either party owes any legal obligation in respect of the other.
20. Given the constraints of residing in separate countries however, the Tribunal accords little weight to the financial aspects of the relationship in this case.

21. Nature of the household

22. In a written statement dated 22 May 2015, the first-named visa applicant acknowledged that the parties have only lived together for two short periods, being for some five weeks between their marriage on 23 January 2015 and the review applicant's return to Australia on 3 March 2015; and for some four weeks in February-March 2017 when the review applicant returned to Ethiopia. The first-named visa applicant stated:

23. *"We lived for a very brief period together only after we got married. Our Christian religion and culture does not allow us to live together before marriage. Therefore... I am not able to provide much information about the nature of our household. I can only say that during the brief period after we got married and lived together briefly at [the review applicant's] mother's home we would go out together to buy food to cook for ourselves and I have to say that I did most of the cooking and [the review applicant] would help with the dish washing. We also stayed together as a married couple and enjoyed a short honeymoon for a short period of 33 days at a restaurant hotel after our marriage in early 2015. In [the review applicant's] second trip recently in early 2017, we lived together at his family home, at my home and also at a local hotel to have some time to ourselves. We stayed at the same hotel for 17 days. During our stay at the hotel on the two occasions we would eat out most of the time. While at his home and at my home we would live as a couple doing the meal and washing up chores together. Sometimes we would eat out and that would mean no cooking and washing of dishes. I am eagerly waiting for the time when we can be together again when we can truly establish a household and only then can we share our household duties equally."*

24. Since the commencement of the marriage, the couple have resided together on two separate occasions: for some five weeks in January-March 2015 subsequent to their marriage on 23 January 2015; and some four weeks in February-March 2017. The Tribunal was also provided with travel documentation attesting to the review applicant's proposed return to Ethiopia on 1 July 2018 at which time he intends to spend some three weeks with the first-named visa applicant.
25. While the Tribunal acknowledges these periods of cohabitation, the Tribunal found no evidence that the parties had established a household at these times, noting that much of their time together has been spent in hotels and/or the review applicant's mother's home. The Tribunal therefore finds no substantive evidence concerning the living arrangements of the persons; the sharing of responsibility for housework and domestic duties; or any joint responsibility for the care and support of children.

26. Given the constraints of residing in separate countries however, the Tribunal accords little weight to the consideration of the nature of the parties' household in this case.

27. Social aspects of the relationship

28. The Tribunal received oral evidence from the review applicant and first-named visa applicant; statutory declarations from friends of the review applicant; and written statements from the review applicant's father and the first-named visa applicant's paternal uncle attesting that the relationship between the parties is genuine and continuing and has the support of their respective families. In particular, the review applicant's father's statement (dated 23 May 2017) reflects on the review applicant's efforts in 2013 to locate his childhood friend (the first-named visa applicant), and his subsequent request to his father in 2014 to assist him in seeking a marriage:

29. *"In late 2014, my son [the review applicant] contacted me and informed me that he wished to get married and settle down. He told me there was a particular girl that he wished me to help him to ask her family for permission to marry her as was required in our custom and culture. She was a girl that he first met about 9 years ago in 2005. He told me her name was [the first-named visa applicant] and she lived in a village named Gode Duro. Like any father I was extremely happy to learn that my son was finally wanting to settle down and start a family... So I immediately went to my mother's house to get more information about [the first-named visa applicant] and she told me that [the first-named visa applicant's] parents had passed away in a car accident and I could only speak to an uncle as the remaining elder relative... When I finally located [the first-named visa applicant's] uncle I told him that my son would like to get to know [the first-named visa applicant] better with the view to marry her. I wanted to know if he would give his blessing to their friendship and eventually and hopefully their marriage. Thankfully he gave his blessing to [the review applicant's] relationship with [the first-named visa applicant]."*

30. The Tribunal was also provided with photographic evidence showing the couple – together and/or in the company of others – engaging in social and recreational activities with members of their respective families and friendship networks during the course of the review applicant's stays in Ethiopia in January-March 2015 and February-March 2017. The evidence depicts the couple's wedding celebration in 2015, including a traditional horseback procession bringing the review applicant to the home of his intended bride; and photographs of the couple with family members and friends in a range of informal social and recreational settings in 2017.
31. On consideration of the evidence, the Tribunal finds that the persons represent themselves to other people as being married to each other, and that the relationship is a genuine and continuing relationship in the opinion of family members and friends. The Tribunal also finds that the couple plan and undertake joint social activities within the constraints of principally residing in separate countries.
32. The Tribunal is satisfied that the social aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.

33. Nature of the person's commitment to each other

34. The Tribunal received documentation and oral evidence stating that the couple first met in July 2005 when the review applicant visited a church with his grandmother in the first-named visa applicant's home town of Gode, Ethiopia. At that time, the parties were 14 years of age and 11 years of age respectively. The review applicant states that while visiting with his grandmother, he spent a few weeks playing piano in the church choir, of which the first-

named visa applicant was a part. The persons exchanged landline phone numbers and talked a few times subsequent to the review applicant's return to school; however the parties fell out of contact when the review applicant travelled with his uncle to Kenya later in 2005, at which time he lived in [a particular location] for some [four years].

35. The review applicant [subsequently] settled in [Australia] in September 2009 and quickly turned his attention to studying to become a nurse. Several years later, the review applicant determined that he should marry and he contacted his brother in October 2013 to seek assistance in locating the young woman [the first-named visa applicant] he had formed a friendship with many years earlier. In her written statement, the first-named visa applicant characterised the commencement of the relationship thus:

36. *"I also learnt later from [the review applicant] that in the middle of 2013 after having settled and secured a job in Australia he thought of getting married to start a family and that was the time that he thought of me. He confessed to me later that he had thought about me quite often all those years and when it came to looking for a wife, he had no hesitation to think of me as his future wife. For the next half year we communicated with each other through the phone. However, the communications system in Ethiopia is very bad and not reliable and therefore we could not communicate with each other as often as we would have liked to. But during those rare occasions that we managed to do so, we cherish and value those moments... Sometime in September 2014 we started to talk about marriage and it was the only natural thing to do as he was my only boyfriend and I was his only girlfriend. Then one day which I am not able to remember, [the review applicant's] father and two elders from his community came to see my uncle to ask for my hand to marry [the review applicant]. Of course my uncle consented."*

37. After the couple's subsequent marriage in January 2015, the persons have continued to communicate regularly via the telephone and the review applicant supplied detailed documentation attesting to the frequency of this contact. The review applicant also returned to Ethiopia in February-March 2017 and intends to do so again in July 2018. In oral evidence, the couple demonstrated substantial knowledge about each other's personal histories, habits, character, family arrangements, current circumstances and future aspirations. The couple gave credible evidence regarding the development of their relationship from its first beginnings when they met as school-aged children in the first-named applicant's home town; and since 2013 as persons initially recommencing a friendship after many years, and then developing a genuine and continuing spousal relationship.
38. On consideration of the evidence, the Tribunal is satisfied regarding the duration of the relationship and the length of time the couple have lived together (and not lived separately and apart) since their marriage in January 2015. The Tribunal is also satisfied that the persons draw on each other for a significant degree of companionship and emotional support, and that they view their relationship as a long term one.
39. The Tribunal is satisfied that the nature of the persons' commitment to each other attests to the genuine and continuing spousal relationship between the parties.

40. **Other matters for consideration**

41. Of significant concern to the delegate in consideration of the household composition in this matter was the dependent status of the secondary visa applicants (being the first-named visa applicant's three younger brothers) as it relates to the first-named visa applicant's claim that her parents died in a motor vehicle accident in October 2009. The delegate concluded that he could not be satisfied the secondary applicants were dependent on the first-named

visa applicant as he was concerned about the legitimacy and veracity of the death certificates provided by the first-named visa applicant, and by certain other inconsistencies arising from other supporting documentation. The delegate stated:

42. *“I find therefore that the secondary applicants are members of the family unit of their parents and not the main applicant. I find that the parents are the family head of their household and not this main applicant.”*

43. In submissions, documentation and oral evidence, the parties addressed these concerns to the Tribunal's satisfaction. Certified copies and translations from the Regional State of Oromia were provided clarifying an inaccuracy on the original death certificate; the administrative process by which the certificate was initially provided to the first-named visa applicant in June 2015; and the practical reason the first-named visa applicant's parents were buried in a Muslim cemetery in 2009 (rather than a Christian site), being that there is no Christian cemetery in their home town of Gode Duro. In response to a request from the Tribunal, the first-named visa applicant also provided a further written statement on 26 April 2018 addressing the Tribunal's concerns about these matters, including the issue of her familial relationship with the secondary applicants.
44. On the basis of the evidence before it, the Tribunal finds that the first-named visa applicant's died in a motor vehicle accident on 12 October 2009 and that the secondary applicants (aged 13 years, 16 years and 17 years respectively) are the dependents of the first-named visa applicant.
45. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the first-named visa applicant and the review applicant had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that the first-named visa applicant and the review applicant have lived together (and are not living separately and apart on a permanent basis) and have a shared commitment to a future as a married couple.
46. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the first-named visa applicant meets cls.309.211(2)(a), 309.221 and 309.223.

47. **Conclusion**

48. Given the findings above, the appropriate course is to remit the application for a visa to the Minister to consider the remaining criteria for grant of a Subclass 309 visa.
49. As the Tribunal is remitting the application for the visa by the first-named visa applicant, it is appropriate that the applications by the second-, third- and fourth-named visa applicants also be reassessed.

DECISION

50. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the first-named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cls.309.221 and 309.223 of Schedule 2 to the Regulations.

51. The Tribunal also remits the applications by the second-, third- and fourth-named visa applicant for consideration in accordance with the original application.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).